the basis for establishing personal jurisdiction by service of process outside of the state if the person, at the time of the service of process, is either a non-resident of the state or a resident of the state who is absent and who has those sufficient "minimum" contacts permitting the assertion of such jurisdiction.

Admittedly, NADEJDA attempted service upon LEILA in accordance with Rule 4.4(d)(5), Alabama Rules of Civil Procedure (prior to its last amendment) (C.R. 21-25), and by publication (C.R. 26-27). The necessity for out of state service was rendered moot by two occurrences. First, on motion by NADEJDA, a special process server was appointed to serve process on LEILA (C.R. 2, see entries of 09/05/2002 and 09/06/2002) and, in accordance with that appointment, and on October 1, 2002, the process server, Jake Gilliam, served LEILA in Madison County, Alabama, and the return was made to the Circuit Clerk (C.R. 2 [see entries of 09/13/2002 and 10/02/2002] and Supplemental C.R. 3-4) and, thereafter, on October 23, 2002, in form authorized by Rule 4(h), Alabama Rules of Civil Procedure (prior to its last amendment), William P. Burgess, Jr. accepted service on behalf of LEILA.

Standing alone, either of those occurrences is sufficient to give the court *in personam* jurisdiction over LEILA. This Court, in the case of *Jennings v. Jennings*, 647 So.2d 777 (Ala.Civ.App. 1994), stated:

> " . . . (i)t is undisputed that the father was personally served while he was in Alabama. Rule 4.1(a), Ala.R.Civ.P., provides that service 'within this state . . . shall be deemed to confer in personam jurisdiction.' This state has long allowed a legal action to be brought against a non-resident who is personally served here. 'However

> transiently the defendant may have been in the State, the summons having been legally served upon him, the jurisdiction of his person was complete, in the absence of a fraudulent inducement to come.' *Smith v. Gibson*, 83 Ala. 284, 285, 3 So. 321, 322 (Ala. 1888). The United States Supreme Court more recently addressed this issue in *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed. 2nd 631 (1990), and held likewise."

In addition, the duly authorized acceptance of service (Supplemental C.R. 5) was executed by the attorney authorized to accept service in Alabama. Recently, *KingVision Pay Per View LTD v. Ayers*, 203 WL 22753170, dealt with many of the same issues as presented here. Recognizing that Rule 4(h), Ala.R.Civ.P., provided certain restrictive formalities to waive the service of process, also reflected that Rule 12(h)(1), Ala.R.Civ.P., provided that:

> "A defense of lack of jurisdiction over the person, . . . or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

The *KingVision* court, *supra*, also recognized and quoted from the case of *Lonning v. Lonning*, 199 NW 2d 60, 62 (Iowa 1972), as follows:

> "The rules which govern our consideration of this case are well established. The filing of pleading is a general appearance. Rule 65(c), Rules of Civil Procedure. Jurisdiction of the person in a civil case may be acquired by service of notice in

> the manner and form prescribed by law, or by defendant's general appearance. [citations omitted] A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court. [citations omitted] He may not thereafter avoid that jurisdiction by special appearance. *Gardner v. Beck*, 195 Iowa 62, 189 NW 962 (1922); 5 AmJur 2d, *Appearances*, Section 16, pp. 491-92; 6 CJS, *Appearances*, Section 24, p. 67."

In the *KingVision* matter, the court dealt with an argument by KingVision that proper service was not made and that they did not accept or waive service under Rule 4(h), Ala.R.Civ.P., but went further in stating that:

> " . . . KingVision overlooks Nelms's filing of the Rule 12(b) motion, answer and amended answer that failed to assert the insufficiency of the service of process on KingVision. If Nelms had authority to file these pleadings on behalf of KingVision, then Rule 12(h)(1), Ala.R.Civ.P., Kingston waived the insufficiency of the service of process. Thus, the dispositive issue in this appeal is whether Nelms had authority to file these pleadings."

In this matter, clearly Mr. Burgess had authority to file the pleadings on behalf of LEILA.

While either of those two occurrences is sufficient to establish *in personam* jurisdiction over LEILA, her response as filed on December 18, 2002, raises neither insufficiency of service of process nor lack of *in personam* jurisdiction. (C.R. 28-31) It does set forth a motion to dismiss under Rule 12(b)(6), Ala.R.Civ.P., but that does not contain allegations questioning the jurisdiction of the

parties. See also *Palmer v. Braun*, 376 F.3d 1254 (11th Circ. 2004).

Now those two occurrences, of themselves, should be enough to show that the court had jurisdiction over the person of LEILA. Nevertheless, there is more. LEILA later, on June 19, 2003, filed a counterclaim against NADEJDA (which appears to have been permissive in nature) and a cross-claim against VLADIMIR. (C.R. 57-62) While counterclaims may be either compulsory or permissive (Rule 13(a)and (b), Ala.R.Civ.P.), a cross-claim against a co-party is never compulsory since Rule 13(g), Ala.R.Civ.P., provides:

> "A pleading **may** state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." (Emphasis added.)

Thus, by filing the permissive counterclaim and certainly by filing the cross-claim, LEILA specifically invoked the jurisdiction of the Alabama court. *Essenburg v. Essenburg*, 1997 WL 412513 (Neb.App. 1997).

In addition, LEILA physically appeared in the Circuit Court of Madison County, Alabama, with an attorney and with an interpreter (R.T. 9/22/03 4-7 and R.T. 9/22/03 9-17). During the entire colloquy between the court, the parties and the attorneys, no mention was made about the court's failure to rule upon any motion, nor was there any

questioning of the jurisdiction of the court. *Birmingham Flooring Mills v. Wilder*, 5 So. 307 (Ala. 1889).

LEILA was served personally with the Summons and Complaint. (C.R. 2 [see entries of 9/13/2002 and 10/2/2002] Supplemental C.R. 3-4.) She then filed an acceptance of service authorizing William P. Burgess, Jr. to accept service on her behalf (Supplemental C.R. 5). She filed a response which incorporated a Rule 12(b)(6), Ala.R.Civ.P., motion to dismiss without questioning the jurisdiction of her person for the purposes of setting aside the fraudulent transfer. In dealing with the issue of counterclaims as waivers of objections to jurisdiction, Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure*, Section 1397 (Rev. 2nd Ed. 1990), in pertinent parts, provides as follows:

> " . . . other courts have limited the application of waiver to cases in which the counterclaim asserted is permissive under Rule 13(b) rather than compulsory under Rule 13(a). This distinction has some merit. It can be argued that by interposing a permissive counterclaim, a party voluntarily asks the court for affirmative relief and thus should not be allowed to make objections based on personal inconvenience. Similar reasoning can be applied to Rule 13(g) cross-claims, which are permissive. . . . "

Here, the filing of the cross-claim against VLADIMIR was clearly permissive. In fact, the counterclaim filed against NADEJDA seeks monetary relief on a promissory note, unrelated to the claim asserted by NADEJDA, thereby falling into the realm of permissive counterclaims.

II. The Petitioners were not denied due process of law because the settlement agreement that was enforced was not procured as the result of duress and coercion, but was agreed to voluntarily by Petitioners.

PETITIONERS next argument contains allegations that they entered into the settlement agreement as a result of duress or coercion. However, it is clear that both parties either clearly understood the occurrences or voluntarily decided not to inform their attorneys of any confusion. Leila (through the interpreter hired by her), Vladimir and Nadejda each affirmed that their agreement had been read into the record properly (R.T. 09/22/03 16) and Nadejda's attorney was to draft the judgment and have it approved by the other attorneys prior to presentation to the court (R.T. 09/22/03 16).

The Final Judgment of Divorce as entered on September 30, 2003, contained an approval by Nadejda's attorney, Vladimir's attorney and Leila's attorney endorsed thereon (C.R. 107).

A hearing was held on the motions filed by both parties on December 23, 2003, with Nadejda being present through her attorney, Leila being present through her attorney (R.T. 12/23/03 2) and Vladimir being present in person as well as by counsel (R.T. 12/23/03 3).

The case of *Hill v. Cherry*, 379 So.2d 590 (Ala. 1980) is helpful in reviewing this issue. In that case, a settlement agreement was dictated into the record and a final judgment incorporating that was drafted by the attorney for the parties who appealed. The court in that case cited the case of *Hawk v. Biggio*, 372 So.2d 303 (Ala. 1979), by stating:

> " . . . we upheld a trial court's denial of a motion for a new trial in a similar case where a party was attempting to renege on a settlement agreement. In Hawk, we held the trial court was correct in deciding the appellant's attorney was authorized to make a settlement agreement. We held in that case the evidence demonstrated the appellant was kept informed and participated in the settlement negotiations. Therefore, the trial court was correct in enforcing the settlement agreement entered into between the parties. We reach the same conclusion and result in this case."

In NADEJDA's response to the motions filed by VLADIMIR and LEILA, there is attached copies of a facsimile transmittal from VLADIMIR's attorney indicating changes to be made to the proposed order (C.R. 159-160). There is also a sworn statement from the attorney for NADEJDA that he prepared and sent by facsimile as follows:

> " . . . 12. I prepared and sent by facsimile transmission to Paul Millirons, as attorney for Vladimir, and to Bill Burgess, as attorney for Leila, a proposed Final Judgment of Divorce. I received no proposals for changes back from Bill Burgess, but did receive some proposed changes from Paul Millirons. A copy of the return fax and attached changes is attached hereto. Those changes were incorporated into the proposed decree and again faxed to the parties. After receiving notification that both attorneys were prepared to sign, the original of the Final Judgment of Divorce was hand carried by runners from my office to Mr. Millirons who signed, and also to Mr. Burgess, who approved. After I added my signature, that

> final proposed judgment was submitted to the Court." (C.R. 153-154)

The lawyers were authorized to approve the order, and did so. Both Leila and Vladimir appeared at court assisted by able trial counsel. Both of these attorneys reviewed the written judgment that was submitted to the trial court and, after some "tweaking" by Vladimir's lawyer with regard to provisions relating to Leila, both attorneys signed indicating their approval of the written document for entry by the court. Notwithstanding the presumption with regard to non-included evidence, it is clear that lawyers, acting with authority from their clients, reviewed, modified and ultimately approved the final judgment to which Leila and Vladimir object.

Clearly, in this case, there was a piece of evidence offered and admitted without objection (R.T. 09/22/03 16) which dealt with division of personal property. The record on appeal does not, however, contain a copy of that exhibit. Because of that, all of the evidence before the trial court is not before this Court. As the Supreme Court stated in the case of *Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 331, 345 (Ala. 2002):

> ". . .It is a well established principle of appellate procedure that 'when all the evidence before the trial court is not before this Court, it is presumed that the missing evidence is sufficient to support the evidence and the judgment [will] not be disturbed.' *Seidler v. Phillips*, 496 So.2d 714, 716 (Ala. 1986) (concluding citations omitted)." See also *Grand Lodge Knights of Pythias of Alabama v. Hermione Lodge No. 16, Knights of Pythias of Decatur*, 258 Ala. 641, 64 So.2d 405 (Ala. 1952); *Martin v. King*, 50 Ala.App. 523, 280 So.2d 783

(Ala.Civ.App. 1973); and, *Vaughn v. Oliver*, 822 So.2d 1163 (Ala. 2001).

Stated differently, this Court will not speculate on the contents of evidence that it has not seen. This particular response relates not only to the claim set forth by LEILA, but also to a portion of VLADIMIR's assertions.

III. The Settlement Agreement is not due to be set aside because the Petitioner was allegedly mentally ill at the time of making the agreement, and allegedly denied an opportunity to have a hearing on the issue.

VLADIMIR's Claims – Now dealing with the issues raised by VLADIMIR. First, as to the issue of whether the trial court was required to hold an evidentiary hearing on VLADIMIR's unsworn assertion that he suffered from mental incompetency at the time of the settlement and that he should not be bound by it, no citation of authority is presented. Indeed, the record indicates that the sole reference with regard to testimony on the issue was raised by NADEJDA's attorney involving the following statements in the record:

> "MR. BAXTER: If there is going to be testimony concerning this issue, I want a hearing on it and I want the guy up here.
>
> THE COURT: Okay.
>
> Well, I was trying to allow Mr. Bailey to more or less substantiate the fact that he had prescriptions that he had, indeed, since you've made those allegations or comments in your brief.

> And if he can substantiate that and say, "Yes, I prescribed these for him," and what date he prescribed them or something like that, I may even – if he said "yes" and did it in the form of counseling or something like that, I would not object to that.
>
> I will have to receive what you think you need to explain on behalf of your client, and, then, if I don't like it or I think I need a response from Mr. Baxter, I will tell them.
>
> . . .
>
> Anything further?
>
> MR. BRADLEY: No, sir."

(R.T. 12/23/03 29-30)

There is no reference to a request to offer testimony or other evidence, nor is there any documentary evidence contained in the record, if any was furnished to the court. Again, there are, contained in the record, only unsubstantiated and unsworn allegations.

Additionally, in a case that bears particular significance here, this court, in *Bailey v. Bailey*, 560 So.2d 1076 (Ala.Civ.App. 1990), stated:

> "Furthermore, to set aside a divorce decree, or, as here, part of it, based on lack of capacity, the movant bears the affirmative burden of proving that he was *non compos mentis* at the time of its entry. (Citations omitted.) The movant must overcome a presumption of sanity. **MERE EMOTIONAL INSTABILITY OR DEPRESSION IS INSUFFICIENT.** *Goza*. However, the term "*non compos mentis*" does not necessarily denote a total destruction of the intellect, but there must be

> such at least a severe impairment of the mental faculties as to make the movant incapable of protecting himself or managing his affairs." (Emphasis added.)

In that case, the husband contended that because he was a recovering alcoholic and had been in recovery for only a few months when the settlement agreement was reached, he was under a great deal of stress and that he should not have made any major decision during the first year of his recovery and that the trial court should have granted his motion to set aside the divorce decree. The court stated, "We disagree." See also *Goza v. Goza*, 470 So.2d 1262 (Ala.Civ.App. 1985).

With regard to the other issues raised by VLADIMIR, NADEJDA has previously addressed that matter in the brief in discussing the situation with regard to LEILA, except for, perhaps, the fact that it is apparent from the record that the Exhibit 1 introduced into evidence specifically set out the division of personal property (R.T. 9/22/04 16). As previously has been stated, where evidence that was before the court is not included in the record on appeal, the court presumes that the evidence was sufficient to support the court's ruling.

CONCLUSION

In conclusion, and in viewing the record, as it must be viewed, in determining whether there was a palpable and erroneous abuse of discretion by the trial court, it is clear that, as to every issue raised, the court's decision not only was not an abuse of discretion, but, in fact, was supported by the law and facts at every turn.

Clearly, the trial court had both subject matter jurisdiction over the divorce between NADEJDA and VLADIMIR and the suit to set aside the fraudulent transfers between NADEJDA, LEILA and VLADIMIR, and, because of personal service while within the state of Alabama, waiver by failure to raise the issue and by participating in the proceedings and trial, over LEILA. Each party appeared at the docket call and, after about two hours of discussion, announced to the court a resolution of the matter in its entirety. The matter was read into the record, except as to the division of certain personal property, with a written document being offered and received into evidence reflecting that division. Because that written document is not included in the record on appeal, this Court must presume that it supported the rulings by the court. Notwithstanding that, each attorney for each party approved for entry the final judgment of divorce as signed and entered by the court.

Accordingly, this Court should deny **Petitioners'** Petition for a Writ of Certiorari.

Respectfully submitted,

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